84-254

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEMAN L. HUTCHINSON, JR.
Lance Corporal, U.S. Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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10 pp

QUESTION PRESENTED

Whether petitioner has been denied his right to due process of law under the Fifth Amendment when he was convicted of capital offenses by a two-thirds vote of a court-martial composed of only six members.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No.

LEMAN L. HUTCHINSON, JR.
Lance Corporal, U.S. Marine Corps,
Petitioner

V.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Lance Corporal Leman L. Hutchinson, Jr., U.S. Marine Corps, petitions for a writ of certiorari to review the judgement of the United States Court of Military Appeals in this case.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (App. 1a) is reported at _____ M.J. _____ (C.M.A. 1984).

The order of the United States Court of Military Appeals denying petitioner's request for a rehearing (App. 3a) is reported at _____ M.J. _____ (C.M.A. 1984). The opinion of the United States Navy-Marine Corps Court of Military Review (App. 5a - 34a) is reported at 15 M.J. 1056.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on June 1, 1984. The petitioner's request for rehearing was denied on June 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1). [1]

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[1] The United States Court of Military Appeals reversed petitioner's death sentence and returned the case to the

STATUTORY PROVISIONS INVOLVED

Article 16, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 816, provides:

> The three kinds of courts-martial in each of the armed forces are --
> (1) general courts-martial, consisting of --
> (A) a military judge and not less than five members; or
> (B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a

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Court of Military Review which may substitute a sentence of life imprisonment and accessory penalties (reduction in rank, forfeiture of pay and a dishonorable discharge) for the sentence of death. That proceeding is pending at this time and does not bear on the question presented in this petition. Accordingly, under Sup. Ct. R. 20.4, petitioner's time to petition for certiorari runs from the denial of his rehearing petition notwithstanding the pendency of the proceeding regarding sentence before the Court of Military Review.

military judge and the military judge approves;

(2) special courts-martial, consisting of--
(A) not less than three members; or
(B) a military judge and not less than three members; or
(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and
(3) summary courts-martial, consisting of one commissioned officer.

Article 52(a), UCMJ, 10 U.S.C. § 852

provides:

(a)(1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.

(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

STATEMENT

Pursuant to his authority under the Uniform Code of Military Justice,[2] the Commanding General of the Second Marine Division, Fleet Marine Force, Camp Lejeune, North Carolina, convened a general court-martial to hear the case against the petitioner. Contrary to his pleas of not guilty, petitioner was convicted by the general court-martial composed of six members of two conspiracies to commit murder, three conspiracies to commit robbery, premeditated murder, felony murder, robbery, solicitation to commit murder

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[2] Article 22, UCMJ, 10 U.S.C. § 822.

and solicitation to commit robbery in violation of Articles 81, 118, 122, and 134 of the UCMJ. [3] The court-martial members sentenced him to be reduced in rank to pay grade E-1, to forfeit all pay and allowances, and to be put to death. The Commanding General of the Second Marine Division approved the sentence following his review of the case pursuant to Article 60, UCMJ. [4] The U.S. Navy-Marine Corps Court of Military Review dismissed one of the three conspiracies to commit robbery,

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[3] 10 U.S.C. § 881, 918, 922 and 934. The death penalty is not mandatory under these statutes. Under Article 52(a), UCMJ, only a two-thirds vote was necessary to convict.

[4] 10 U.S.C. § 860.

but affirmed the remaining findings of guilty and the sentence as awarded by the court-martial. [5] Because the sentence in this case included death, the case was forwarded under Article 67(b)(1) [6] to the United States Court of Military Appeals for mandatory review. The petitioner raised in that court, inter alia, the issue contained in this petition, but that court found all of the issues raised by the petitioner to be without merit except for the issue causing the sentence to be reversed (App. 1a). The

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[5] Under Article 66, UCMJ, 10 U.S.C. § 866, a Court of Military Review must review every court-martial conviction where the approved sentence affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more. The opinion of the Court of Military Review is included infra at App. 5a-34a.

[6] 10 U.S.C. § 867(b)(1).

case was remanded to the Court of Military Review to substitute a new sentence. [7] On 9 August 1984, that court substituted a sentence of life imprisonment for the death penalty in accordance with the decision of the Court of Military Appeals.

The petitioner entered pleas of not guilty to the ten specifications against him. His general court-martial was composed of only six court-members. [8] Two-thirds of the members present at the time the vote was taken concurred in each finding of guilty (R. 1236). [9] Because

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[7] Courts of Military Review possess broad fact finding powers including the power to determine an appropriate sentence. 10 U.S.C. § 866(c).

[8] Court members at a military court-martial function in the same fact finding capacity as a civilian jury.

[9] Although the findings of the court-martial were announced in this way,

there were six members, and because the death sentence was not mandatory in this

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the exact vote cannot be determined. Article 51, UCMJ, 10 U.S.C. § 851, states that voting by the court members shall be by secret written ballot. The oath of a court-member includes that he will "not disclose or discover the vote or opinion of any particular member of the court upon the finding or sentence unless required to do so in the course of law." Manual for Courts-Martial, United States, 1969 (rev. ed.), (MCM) ¶ 114b. Cases have held that polling a court-martial is unknown in military law. United States v. Tolbert, 14 C.M.R. 613 (A.F.B.R. 1953); United States v. Connors, 23 C.M.R. 636 (A.B.R. 1957). Since the vote of petitioner's court-martial is not indicated in the record and cannot be determined, it should be presumed that only the minimum necessary for conviction, namely four, was the vote. This presumption should be made since it is the possiblity of conviction by this minimum number that petitioner attacks. Said another way, if this Court were to deny certiorari, it would, in effect, be accepting this minimum number as constitutionally sufficient. See, e.g. United States v. Guilford, 8 M.J. 598, 601 n.3 (A.C.M.R. 1979). Even though two members may have voted not guilty, it was still their duty to vote for a proper sentence for the offenses for which petitioner was convicted. ¶ 76b(2), MCM.

case, Article 52, UCMJ, required only four members to vote in favor of conviction. However, unanimity was required to arrive at the penalty of death. [10]

REASONS FOR GRANTING THE PETITION

In rejecting petitioner's arguments below, the U.S. Court of Military Appeals decided an important question of federal and military law which has not been, but should be, settled by this Court, namely, whether due process is violated where

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[10] A trial by court-martial is a bifurcated proceeding. After findings are made by the court on guilt or innocence, if any guilty verdicts are returned, a sentencing hearing is conducted where the rules permit the accused broad latitude in presenting matters in mitigation and extenuation. The members are separately instructed during this hearing and these instructions must be tailored to the evidence. The sentencing decision of the members is binding on the military judge.

there has been a military conviction of a capital offense by a non-unanimous vote of a group as small as six persons. In addition, although the Court of Military Appeals set aside the death penalty within the military because of deficient capital sentencing procedures,[11] the President has promulgated amendments to military sentencing procedures for cases where the death penalty is authorized.[12] These amendments apply to trials of capital offenses committed on or after January 24, 1984. It therefore appears

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[11] In United States v. Matthews, 16 M.J. 354 (C.M.A. 1983), the court found that sentencing procedures in death penalty cases did not satisfy the constitutional requirement that court members make specific findings of individualized aggravating circumstances.

[12] These amendments are contained in Exe. Order No. 12460, 49 Fed.Reg. 3169 (1984).

that future military defendants will be susceptible to conviction of capital offenses by votes of non-unamimous panels of as few as five members, and later to death sentences. As this Court reviews more petitions for certiorari from service personnel, this issue will likely be a recurring one. It presents a question that goes right to the heart of the integrity of the military justice system. To petitioner's knowledge, this system is the only one in this country that permits conviction of a capital offense upon the vote of only two-thirds of as few as five finders of fact (although there were six in this case). Whether such a system comports with the due process requirement that conviction can only obtain upon proof beyond a reasonable doubt is a question this Court is urged to resolve.

1. Court-Martial Procedures

Pursuant to its constitutional power "[t]o make rules for the government and regulation of the land and naval forces," [13] Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950. It was thereafter revised, codified and enacted into law as part of title 10, United States Code, by the act of August 10, 1956 and has subsequently been further amended. [14] The UCMJ provides, inter alia, for the creation of military courts-martial, procedures, and specification of military offenses. Within this system, there are four levels available for disposition of charges against an

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[13] U.S. CONST. art. I, §8, cl.14.

[14] 10 U.S.C. § 801-940.

accused: nonjudicial punishment, summary court-martial, special court-martial and general court-martial.

A military commander may impose nonjudicial punishment for minor offenses without resort to a court-martial. [15] This punishment is merely corrective in nature and is not a judicial determination. A summary court-martial is a one officer court which does not differ remarkably in its punishment authority from what a commanding officer may impose as nonjudicial punishment. [16] Special and general courts-martial may impose much greater punishments over

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15 10 U.S.C. § 815.

16 See, Middendorf v. Henry, 425 U.S. 25 (1976) where this Court stated that a summary court-martial is not a criminal proceeding within the meaning of the sixth amendment.

what the commanding officer or the summary court-martial officer can impose. The punishment jurisdiction of a general court-martial is limited only to the maximum for those offenses of which the accused has been convicted. The punishment jurisdiction of a special court-martial is limited to either six months imprisonment or the maximum for the convicted offenses, whichever is less. [17]

While civilian juries tend to be of a uniform size, numerical composition of special and general court-martial panels

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[17] In Article 56, UCMJ, 10 U.S.C. § 856, Congress has authorized the President to prescribe maximum limitations on punishments for particular offenses. Pursuant to that authority, a Table of Maximum Punishments has been promulgated. Manual for Courts-Martial, United States, 1969 (rev. ed.), ¶ 127c.

vary considerably. The minimum number of members is five for a general court-martial and three for a special court-martial. [18] Regardless of the number of members of a court-martial, the concurrence of members necessary to convict is two-thirds. [19] Where the death penalty is mandatory, [20] only a unanimous verdict may convict. [21] To sentence a person to death, where death is not mandated, a unanimous vote is necessary. [22] To sentence a person to

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[18] 10 U.S.C. § 816. These members are selected and appointed by the officer convening the court-martial. There is no maximum number of members he is allowed to appoint.

[19] 10 U.S.C. § 852(a)(2).

[20] Spying in wartime requires the death penalty. 10 U.S.C. § 906.

[21] 10 U.S.C. § 852(a)(1).

[22] 10 U.S.C. § 852(b)(1).

imprisonment for more than ten years, a concurrence of three-fourths is required, whereas all other sentences require a two-thirds vote. [23]

2. Constitutional Standards in Civilian Courts

In Johnson v. Louisiana, 406 U.S. 356 (1972), this Court found that a nine to three vote for conviction of a nonpetty offense did not violate the due process clause because a "heavy" majority of the jury was convinced of the defendant's guilt beyond a reasonable doubt. Two later cases actually found constitutional infirmities because of either small jury size or lack of unanimity. Burch v. Louisiana, 441 U.S. 130 (1979). Ballew v. Georgia, 435 U.S. 223 (1978). In Ballew, this Court held

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[23] 10 U.S.C. § 852(b)(2)(3).

that in a nonpetty case, a jury composed of only five persons deprived the defendant of his right to a trial by jury under the sixth and fourteenth amendments, even though unanimity was also required.

In writing the lead opinion in Ballew, Justice Blackmun observed that the "[s]ixth amendment mandated a jury only of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community." Id. at 230, citing Williams v. Florida, 399 U.S. 78, 100 (1970). In Williams, this Court noted that in 1970 little empirical research existed which had evaluated jury performance and, therefore, it found no evidence to suggest that the intended function of the jury would be impaired by reducing its size to six members. However, since the

Williams decision, a significant volume of research has concluded otherwise. Ballew, 435 U.S. at 231 n. 10. Justice Blackmun noted the following findings:

(1) "[S]maller juries are less likely to foster effective group deliberation." Id. at 232. See M. Saks, Jury Verdict (1977) [hereinafter cited as Saks].

(2) The empirical studies also "[r]aise doubts about the accuracy of the results achieved by smaller and smaller panels, . . . [that is to say] . . . the risk of convicting an innocent person . . . rises as the size of the jury diminishes." Id. at 234.

(3) "[V]erdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the

variance amounts to an imbalance to the detriment of one side, the defense." Id. at 236.

(4) "[P]resence of minority viewpoint [diminishes] as juries decrease in size . . ." Id. Minority group representation on the jury also decreases.

(5) "[W]hen the case is close, and the guilt or innocence of the defendant is not readily apparent, a properly functioning jury system will insure evaluation by the sense of the community and will also tend to insure accurate factfinding." Id. at 238.

Thus, "'[l]arger juries (size twelve) are preferable to smaller juries (size six). They produce longer

deliberations,[24] more communication, far better community representation, and, possibly, greater verdict reliability (consistency).'" Id. at 242. (quoting Saks at 107)

In Ballew, this Court unanimously reversed and remanded for a new trial. Although there were varying opinions as to why reversal was necessary, at least five of the Justices of this Court believed that reducing a jury to five persons in nonpetty cases raised substantial doubts as to the fairness of the proceedings and proper functioning of the jury.

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[24] The court-members in the instant case deliberated on findings only eighty minutes, an average of but eight minutes on each of the ten specifications alleged (R. 1235). The court-members deliberated only forty minutes on the question of whether the appellant should live or die (R. 1318-1319). The presentation of evidence took over two weeks.

Approximately a year after Ballew, the Court held that a state law requiring only five (out of six) votes to convict was unconstitutional. Burch v. Louisiana, 441 U.S. 130 (1979).

The majority opinion stated:

> [M]uch the same reasons that led us in Ballew to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous. (citations omitted) (emphasis supplied).

Id. at 138.

Justice Rehnquist rejected the state's contention that nonunanimous six-person juries saved time, expense and reduced the number of hung juries. He reasoned that such contentions were speculative, at best. Moreover, whenever

the size of a jury is reduced to the constitutional minimum number of jurors, "the additional authorization of nonunanimous verdicts by such juries sufficiently threatens the constitutional principles that led to the establishment of the size threshold that any countervailing interest of the State should yield." Id. at 139. (emphasis supplied).

3. Constitutional Standards and the Military

Consideration of the above case law raises the question of whether a military accused is effectively denied his fifth amendment due process right to the standard of proof beyond a reasonable doubt when the deliberative body is small (six) and the concurrence needed for

conviction is a mere two-thirds.[25] Although in Johnson a nine to three vote was not found to violate due process because a heavy majority of the jury was convinced of the defendant's guilt beyond a reasonable doubt, the same cannot be said of a four to two vote with any assurance whatsoever. Not only is the percentage smaller in this case (67% vs. 75%) but the size of the deliberative group is only half of the one involved in Johnson.

The Ballew and Burch decisions are necessarily applicable to trials by court-martial as a matter of due process; a fortiori in a capital case. In both Burch and Ballew, the convictions were

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[25] In O'Callahan v. Parker, 395 U.S. 258, (1969) this Court stated that the specific right to a jury trial under the sixth amendment does not apply in the military.

set aside because either the size or the voting procedures of the jury threatened the fairness of the proceeding and the proper role of the jury. Under the circumstances of the instant case, petitioner questions the integrity of his court's fact-finding ability, especially in light of the empirical studies noted in Ballew. These studies analyze group decision-making as a function of group size. There is no evidence to support a conclusion that the dynamics of this decision-making process would differ materially between civilian and military juries. [26]

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[26] In fact, the same Professor Saks relied upon so heavily in Ballew has stated that although he knows of no similar studies on military populations, "the same principles [of group decision making] would apply to the military as to civilian decision makers," and "[i]n other areas of research, only negligible or no differences have been found between

Although the United States Court of Military Appeals did not state its reasons for rejecting petitioner's argument on this issue, both the Army and Navy Courts of Military Review have stated why they feel the issue is without merit. [27] Their main reason was that a court-martial panel is unique and not comparable to a civilian jury because its members are selected based on various factors such as age, experience, training and judicial temperament. [28] These decisions of the Army and Navy Courts of Military Review have been convincingly

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civilian and military populations." (App. 36a-40a).

[27] United States v. Corl, 6 M.J. 914 (N.C.M.R. 1979); United States v. Guilford, 8 M.J. 598 (A.C.M.R. 1979). United States v. Meckler, 6 M.J. 779 (A.C.M.R. 1978); United States v. Montgomery, 5 M.J. 832 (A.C.M.R. 1978); United States v. Wolff, 5 M.J. 923 (N.C.M.R. 1978).

[28] 10 U.S.C. § 825(d)(2).

criticized.[29] There is, in reality, no basis to conclude that a civilian juror is any less capable in deciding questions of witness credibility or in drawing proper inferences from circumstantial evidence than a military court-member. Simply wearing a uniform and experiencing military life and training does not improve one's abilities as a juror.

There is no evidence or empirical data available establishing special conditions in the military which would render Burch, Ballew or the due process problem raised in Johnson inapplicable to courts-martial. No facts exist that

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[29] Cohen, H., The Two-Thirds Verdict: A Surviving Anachronism in an Age of Court-Martial Evolution, 20 Cal.W.L.Rev. 9 (1983).

support a rational conclusion that a court-martial with members, particularly in peacetime, differs materially from civilian juries or "other groups" so as to make the empirical studies in Ballew irrelevant in a military setting. Even though a serviceman does not enjoy traditional sixth amendment jury protections in a court-martial, military courts are subject to fifth amendment due process, including the standard of reasonable doubt.[30] Therefore, founded upon due process principles, military defendants may not be constitutionally convicted of nonpetty offenses by a

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30 In re Winship, 397 U.S. 358 (1970); United States v. Ezell, 6 M.J. 307 (C.M.A. 1979).

non-unanimous six-member court-martial. Guilt beyond a reasonable doubt requires a greater deliberative process than is presently required by Articles 16 and 52(a) of the UCMJ.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 1984

APPENDIX

APPENDIX A

UNITED STATES
COURT OF MILITARY APPEALS

UNITED STATES, Appellee	USCMA Dkt. No. 46565/MC CMR Dkt. No. 82-0203
V.	O R D E R
Leman L. HUTCHINSON, Jr. (257-90-7904), Appellant	

Upon consideration of the above-entitled case, which is before this Court on mandatory review under Article 67(b)(1), Uniform Code of Military Justice, 10 U.S.C. §867(b)(1), in light of United States v. Matthews, 16 M.J. 354 (C.M.A. 1983), and the issues discussed in the briefs of the parties and the amicus curiae, which issues we hold to be without merit except for Issue VII, it is by the Court this 1st day of June 1984,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Military Review is reversed as to sentence, and the record of trial is returned to the Judge Advocate General of the Navy for submssion to the Court of Military Review, which may substitute a sentence of life imprisonment and accessory penalties for the sentence of death.

For the Court,

/s/ THOMAS F. GRANAHAN
Clerk of the Court

APPENDIX B

UNITED STATES
COURT OF MILITARY APPEALS

UNITED STATES, Appellee	)	USCMA Dkt. No. 46565/MC
	)	CMR Dkt. No. 82-0203
V.	)	ORDER DENYING PETITION FOR RECONSIDERATION
Leman L. HUTCHINSON, Jr. (257-90-7904), Appellant	)	

On consideration of appellant's petition for reconsideration of the Order of this Court, dated June 1, 1984, returning the record of trial to the Judge Advocate General of the Navy for remand to the Court of Military Review, it is, by the Court, this 19th day of June 1984,

ORDERED:

That said petition for reconsideration is hereby denied.

For the Court,

/s/ THOMAS F. GRANAHAN
Clerk of the Court

APPENDIX C

UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

No.

UNITED STATES OF AMERICA,
APPELLEE

V.

LANCE CORPORAL LEMAN L. HUTCHINSON, JR.,
U.S. Marine Corps,
Appellant

Decided 22 April 1983

Review pursuant to Article 66(c), UCMJ of General Court-Martial convened by Commanding General, 2d Marine Division, FMF, Camp Lejeune, North Carolina 28542

Before ABERNATHY, BARR and MALONE, Military Judges.

ABERNATHY, Senior Judge:

Contrary to his pleas, appellant was convicted at a general court-martial composed of officer and enlisted members of: two separate conspiracies to commit murder and three separate conspiracies to commit robbery; premeditated murder and felony murder; robbery; and, solicitation to commit robbery and solicitation to commit murder; in violation of Articles 81, 118, 122, and 134, Uniform Code of Military Justice (UCMJ), respectively. Appellant was sentenced to reduction to E-1, total forfeitures, and death. By implication, a sentence to death carries a dishonorable discharge. Paragraph 126a, Manual for Courts-Martial, 1969 (Rev.) (MCM).

Appellant was stationed at Camp Lejeune, North Carolina. During the month of January 1981, appellant decided

that he wanted to kill PFC McCrae, basically because he did not like McCrae, he thought it would be an easy way to steal money from McCrae, and he wanted to use McCrae's rifle card to obtain a Marine Corps issue rifle for his own use. Appellant's friend, LCPL Haught, agreed to join him this venture. The two of them conceived a plan whereby they would lure McCrae through a fake drug deal out to an ammo dump in the woods, appellant would shoot McCrae, and they would both then bury the body. McCrae, however, was not interested in their drug deal. Undaunted, appellant and Haught decided to seek out other criminal ventures. On payday night, 30 January 1981, they were joined by PVT Spencer and rode around Camp Lejeune in appellant's Mustang looking for hitchhikers to rob. The

addition of PVT Spencer brought success to this venture: Spencer "punched out" two hitchhikers, obtaining $20 from the first, and a watch and $7 from the second. The proceeds of these transactions apparently did not satisfy appellant and Haught for too long, as three days later they set up a plan to assault and rob PFC Morton in the woods at night. Appellant jumped Morton from behind a tree and the plan would have succeeded, but Morton fought off appellant. Appellant identified himself to Morton and said it was just a joke, an explanation then accepted by Morton. Up to this point, appellant's adventures in crime had not been particularly rewarding, but on 6 February 1981 he hit upon a grandiose idea. Appellant told seven Marines in his Company that he knew

a drug dealer who was selling marijuana for $100 a pound. Four Marines each gave appellant $100 with the understanding that one of them, PFC Gunter, would meet appellant and the drug dealer that night to consummate the deal. Appellant approached Haught with the scheme of killing Gunter in the woods, burying his body, leaving Gunter's car (which Gunter had borrowed from one of the other three Marines) at the bus station, thereby making it appear that Gunter had gone UA with the drugs, and then appellant and Haught could split the $400. Haught replied that it was okay with him as long as he would not have to do the killing or see any blood. This was the substance of a conversation leading to the taking of a human life. Unfortunately for appellant and Haught, things once again did not go

quite according to plan. Appellant drove his Mustang to the Verona Loop area of the base, where he was to allegedly set up the deal, and Gunter and Haught were to follow an hour or so later. Appellant waited in the bushes with a 12 gauge shotgun and then shot Gunter as planned, but the shot merely grazed Gunter's shoulder. Gunter fled back towards his car screaming "Oh God, Oh Hutch, Don't", but appellant caught up with Gunter and fired another blast from the shotgun. This shot, although it propelled Gunter into the open car and caused his innards to protrude through the wall of his abdomen, still did not instantaneously kill Gunter. Haught and appellant pulled the moaning Gunter from the car; Haught punched Gunter in the face to stop him from moaning; Haught, upon appellant's

instruction, took Gunter's wallet; and then Haught, when given the shotgun with the advice from appellant "it is all set," fired a final shot directly into Gunter's face. Appellant and Haught seemed to have been overwhelmed by this sequence of events because they then both fled in appellant's Mustang. Appellant thereafter had the presence of mind to return for Gunter's car, which he then attempted to wipe clean before leaving it at a nearby grocery store. The course of events then flowed in predictable and logical fashion: the body was found two hours later by hunters; appellant's Mustang had been seen at the scene; the police traced the Mustang to appellant; appellant authorized a search of his

house which uncovered the shotgun; and Haught then confessed (albeit a self-serving and not totally truthful confession).

In return for his guilty plea, Haught received a pretrial agreement limiting his sentence to fifty years. He was not obligated to testify at appellant's trial, but he did so under a grant of immunity. Based upon his testimony and the other extensive evidence produced by the government, we are convinced that, with the exception of the charge of conspiracy to rob Gunter, appellant is guilty beyond a reasonable doubt of the offenses as found by the general court-martial. Appellant raises fourteen assignments of error, which we shall discuss in the order assigned.

I

Appellant's first assignment of error is that his challenges for cause against prospective member Captain Peche, who was later peremptorily challenged by the defense, and against members Major Plantz and Gunnery Sergeant Maddox were improperly denied. It is our conclusion that the military judge did not abuse his discretion in determining that these three individuals could sit as fair and impartial members. As background, we would note that the military judge conducted a painstaking, careful and attentive member selection. He allowed counsel wide latitude in examining the members, and he allowed seven defense challenges for cause. The military judge's concern for the magnitude of the member's voir dire and selection is

self-evident by the detailed and conscientious manner in which voir dire was conducted.

Captain Peche made a statement to the effect that he would place the burden on appellant to show why the death penalty should not be imposed. Upon questioning by the military judge and trial counsel, however, he clarified this statement to indicate that he did indeed have an open mind and that he would not make a decision until all the evidence was in and he had heard the other members' views. He stated he could see himself voting for life imprisonment. The Court of Military Appeals held in United States v. Tippit, 9 M.J. 106 (C.M.A. 1980), that the test for inelastic attitude toward imposition of

sentence is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions. Under this standard, it is clear to us that Captain Peche is not an individual uncommonly willing to condemn a man to death rather, since he was willing to consider all of the penalties provided by law, we find that he was not irrevocably committed before the trial had begun to vote either for or against the death penalty, regardless of the facts or circumstances. As such, Captain Peche was qualified to sit as a member.

After the panel had been selected and seated, Major Plantz revealed on his own initiative to the Staff Judge Advocate that he felt that Gunnery

Sergeant Maddox might be an improper member because he had a tendency to act impetuously on occasion. Questioned on this statement in Court, Major Plantz revealed that he had been Gunnery Sergeant Maddox's commanding officer for approximately seven months, and that he felt that although Maddox was a competent noncommissioned officer, he had a tendency to say things before he thought them through. Major Plantz stated that he had counseled Maddox concerning this deficiency, but in his opinion Maddox, who had the nickname "Mad Dog", sometimes tried to live up to his image. Despite these tendencies, Major Plantz felt he could listen to Maddox and accept his point of view where appropriate. He felt that Gunnery

Sergeant Maddox would be a competent member and he had confidence that he would be his own man on the jury. Major Plantz also stated that he had overheard Maddox talking to another noncommissioned officer telling him that he could not really see himself being selected to the jury because of his hardness. Plantz indicated that this had happened in the time frame before Maddox was accepted as a member. Based on the above dialogue, it is the defense assertion that Major Plantz could not follow instructions, that he would not be able to listen to Maddox during deliberations, and that he would in all probability chill or inhibit Gunnery Sergeant Maddox. It is the defense assertion that Maddox was also unable to follow instructions, and that,

furthermore, he was inelastic and biased. It is our conclusion that the entire voir dire of Major Plantz and Gunnery Sergeant Maddox, coupled with the above dialogue, does not support any of these allegations. The defense chose not to recall Gunnery Sergeant Maddox for further voir dire although invited by the military judge to do so. The fact that Major Plantz was of the opinion Maddox was hardheaded does not support the interpretation that he must necessarily be inelastic or biased. Major Plantz stated he did not believe that Maddox would have any problem in expressing his thoughts despite the fact that the Major had found it necessary to counsel him in the past. Major Plantz affirmed that he could listen to Maddox's opinions in

deliberations and evaluate them as he would those of any other member. Neither Major Plantz's conversation with the Staff Judge Advocate nor Gunnery Sergeant Maddox's conversation with the noncommissioned officer can arguably provide a basis for challenge on the grounds that they could not follow instructions. The military judge certainly did not think so, and it is his instructions - to the effect that the members were not to discuss the case with anyone - that were allegedly violated.

Appellant urges us to disregard the clarifications and explanations of these three members and take the statements favorable to the defense point of view at face value. Appellant, citing United States v. Harris, 13 M.J. 288 (C.M.A.

1982), asks us to follow the rule that where it is apparent a potential member has an actual or implied bias against the accused and is challenged on that ground, the military judge is abusing his discretion in relying on the member's assertion, in response to standard voir dire questions, that he could be fair and impartial. In Harris, however, there were other facts of record which raised the question of implied bias: 1) the challenged member was president of the court and wrote or endorsed the fitness reports of three other members of the court; 2) the challenged member worked worked with two of the victims of appellant's larcenies and he discussed these crimes with them prior to trial; and 3) the challenged member, as

chairman of a committee on base responsible for securing areas against loss, had an official interest in discouraging larcenies such as appellant's. From such a basis of facts, we cannot advance a broad general theory, as appellate defense counsel would have us do, that voir dire responses can't be used as a basis to deny a challenge. Furthermore, in the instant case, there are no such extrinsic facts to plainly overcome and impeach these members' assertions. The voir dire in the instant case was exceptionally detailed and exhaustive in its effort to insure the empanelling of a fair and impartial court. The purpose of voir dire generally is to delve into the members' attitudes, and the responses taken as a whole are the only means by which a trial

judge can make his decision. It is apparent to us from the record of this trial that these members had an open mind about the case they were about to try. See United States v. Tippit, supra.

Lastly, the appellant again citing Harris, maintains the military judge abused his discretion in allowing him only one peremptory challenge. Appellant understands Harris to imply that if a challenge for cause is improperly denied, and then that member is peremptorily challenged, error might be present if it is clear that the party desired to peremptorily challenge a different member. Regardless of what Harris may or may not imply, there is no error in the instant case since the challenge for cause against Captain Peche was correctly denied. See United States v. Boyd, 7

M.J. 282 (C.M.A. 1979). An accused, furthermore, is entitled to only one peremptory challenge. Article 41(b), UCMJ; Paragraph 62e, MCM; United States v. Calley, 46 C.M.R. 1131, (A.C.M.R. 1973), affirmed on other grounds, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973).

II

During the course of the trial on the merits, the military judge permitted the defense counsel to cross-examine LCPL Haught as to the terms of his pre-trial agreement, including the sentence limitation of fifty years. The military judge allowed this evidence for the limited purpose of impeaching Haught's credibility. During the sentencing portion of the trial, the defense counsel once again desired to litigate Haught's credibility as reflected by the fifty

year sentence limitation. The military judge, reasoning that the members already knew more than they needed to know about Haught's sentence, ruled that the defense counsel was free to argue the matter of Haught's credibility, but could not argue the fifty year sentence limitation, since that would get into the impermissible area of sentence disparity. During the course of his argument, the defense counsel stated "there is evidence before the court that the only participant in the crime at Verona Loop who is being tried for his life is LCPL Hutchinson." (R. 1300). Since this clearly seemed to the military judge to be an indirect message to the members that Haught had received less than the death penalty, he instructed the members "not to consider the sentence in any other particular

trial." (R. 1317). Appellant asserts that the military judge erred in the above ruling and instruction since the issues of credibility and disparity were of particular relevance in determining an appropriate sentence.

We reject these assertions. Even if Haught's credibility was still a relevant issue, and we do not believe that it was, there were, nonetheless, sufficient facts before the members to review Haught's credibility without considering his sentence. Appellant had been given ample exploratory latitude to probe Haught's credibility on the merits, of which the fifty year sentence limitation was only one portion. The members were still free to reconsider that, in order to get his pretrial agreement approved, Haught retracted his original claim of having

been forced to Verona Loop at gunpoint, that he had at first told the NIS case agent that appellant had fired the final shot, and that Haught admitted he had not told the truth during his providence inquiry. Having the members consider the one additional fact of the fifty year sentence limitation would have added little to help make a determination of Haught's credibility. Furthermore, such a ruling would have allowed defense counsel to bring in through the back door what he could not bring in through the front door: a comparision of Haught's sentence with what the members were considering for appellant. It is appellant's contention that Haught's sentence was relevant to the issue of whether death was an appropriate punishment for appellant. The law on

this issue, however, is well decided: the sentence a co-conspirator receives is not a proper consideration at trial. United States v. Anderson, No. 79 1931 (N.C.M.R. 4 July 1980); United States v. Raggins, No. 78 1258 (N.C.M.R. 25 September 1979). See also paragraph 72b, MCM. Appellant cites United States v. Olinger, 12 M.J. 458 (C.M.A. 1982) as authority for his position; that decision however, is limited to comparisons of sentences on review.

III

Despite appellant's contentions to the contrary, we specifically find the record of trial to be verbatim and complete. No matter affecting a substantial and material right of appellant was omitted. The out-of-court conferences objected to by appellate

defense counsel, aside from the fact that they dealt with immaterial matters, were either adequately summarized on the record, or were waived by defense counsel's failure to object when given the opportunity to do so. See United States v. Eichenlaub, 11 M.J. 239 (C.M.A. 1981); United States v. Lashley, 14 M.J. 7 (C.M.A. 1982); United States v. Perry, 12 M.J. 920 (N.M.C.M.R. 1982). Furthermore, all documents required to be attached to the record were so appended. See United States v. Barnes, 12 M.J. 614 (N.M.C.M.R. 1981).

VI

Although the military judge adequately advised the appellant of his counsel rights under Article 38(b), UCMJ, the military judge failed to ask appellant whether he desired to then (at

the time of the inquiry) exercise his right to an individual military counsel. Appellant now contends this failure was error, in light of the mandate of United States v. Donohew, 18 U.S.C.M.A. 149, 152, 39 C.M.R. 149, 152 (1969), that the record must "contain the accused's personal response to direct questions incorporating each of the elements of Article 38(b) as well as his understanding of his entitlements thereunder." A reading of the record of the instant case, however, clearly indicates that appellant, who was in the company of two civilian counsel in addition to his detailed military counsel, understood the general rights granted him under Article 38(b) and especially the option to be represented by individual military counsel. If the

failure of the military judge to elicit a response from the appellant as to his desires regarding individual military counsel was error, it was harmless error in light of the fact that he had been advised of and he adequately understood his options. United States v. Turner, 20 U.S.C.M.A. 167, 43 C.M.R. 7 (1970); United States v. Copes, 1 M.J. 182 (C.M.A. 1975).

V

Appellant's fifth assignment of error is that he was denied due process and equal protection by being convicted by a nonunanimous vote of a panel composed of only six members. Appellant additionally asserts that the potential variation in the number of members sitting in courts-martial violates equal protection principles. These arguments

have been offered before this and other Courts of Military Review and have been dismissed. See United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983) and citations listed therein.

VI

On the day before evidence on the merits was to begin, twenty-seven days after the trial had commenced, defense counsel moved for a three week continuance in order that appellant could be examined by Dr. Halleck, a forensic psychiatrist, who would not be available until the expiration of this period of time. The defense counsel represented that appellant was unresponsive to his questions, unable to assist in his defense, and, consequently, the defense lawyers were unable to prepare a defense. The military judge refused to grant the

continuance requested by the defense; however, he did order that another MCM Paragraph 121 Board be conducted on appellant by a different psychiatrist than the one who had conducted the previous 121 Board ordered by the convening authority. This was done, and the results of the Board were made available to the defense counsel a few days later. The military judge told defense counsel that, regardless of the results on the 121 Board, they were free to pursue whatever they wished insofar as a civilian forensic psychiatrist was concerned. Once the results of the 121 Board were published to the defense, the defense evidently decided not to pursue the obtaining of an examination by a forensic psychiatrist because, when asked by the judge what they would do next, the

defense responded they were willing to proceed on the merits. Appellant asserts on this appeal that the judge's refusal to grant the defense-requested delay to consult with Dr. Halleck was an abuse of discretion amounting to prejudicial error.

The decision to grant or deny a continuance rests within the sound discretion of the military judge and his decision will not be overturned absent a clear abuse of discretion. United States v. Menaken, 14 M.J. 10 (C.M.A. 1982). It is clear from the record that no such abuse is present here. The case on the merits was scheduled to begin the next day, there were thirty-four witnesses scheduled to be called, many of them civilians and many who had to travel great distances. The military judge

allowed an overnight recess to see what could develop, and when it became clear that no forensic psychiatrist was going to be available sooner than Dr. Halleck, he ordered the 121 Board. This was a reasonable compromise in light of the fact that appellant has neither a right to a forensic psychiatrist nor a right to pick who will sit on a sanity board. The military judge did not preclude a later examination by Dr. Halleck or any other forensic psychiatrist, but simply was not prepared to delay the proceedings at that late date for such an examination. It would appear that Dr. Halleck was available prior to or shortly after the end of the trial; yet appellant made no offer of proof that he had been examined by Dr. Halleck or that the results of such an examination would be contrary to

that of the 121 Board. We can find no possible prejudice to the appellant as a result of the judge's ruling; accordingly, we find the military judge did not abuse his discretion. Furthermore, if there ever was an issue here, it was waived by the defense failure to pursue the matter any further.

VII

In his seventh assignment of error, appellant challenges the constitutionality of UCMJ Article 118. Appellant argues that under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), his death sentence must be set aside because: 1) the court-members were allowed unfettered discretion in imposing the death penalty; and 2) the Government was not required to prove any aggravating circumstances.

This assertion was recently rejected by this Court in United States v. Rojas, supra; therefore, we need not address it again.

VIII

Charge I, specification 3 alleges a conspiracy between appellant and LCPL Haught to rob PVT Gunter. The evidence of record to support this allegation was Haught's testimony on direct examination that he and appellant had agreed to rob and murder PVT Gunter on the night in question at Verona Loop. On cross-examination, however, Haught, clarified this statement, and in effect, retracted it. Haught went on to testify that since appellant was already in possession Gunter's $100 for the one pound of marijuana, there was no plan to actually "rob" Gunter. Their plan in

going to Verona Loop was to shoot Gunter in order that the two of them could keep the $400 given them for the purported drug deal. At no time did he and appellant have an agreement to take Gunter's wallet. From the foregoing, it is clear to us that Haught's initial use of the word "rob" was inartful - he and appellant obviously could not conspire to rob Gunter of the $100 which they already possessed. The decision to take Gunter's wallet seems to have been more an afterthought or a spur of the moment decision. Nothing had ever been verbalized between Haught and appellant regarding an intention to take Gunter's wallet until appellant so instructed Haught when Gunter lay moaning on the ground at Verona Loop. Appellant and Haught went out to Verona Loop with one

agreement only, and that was to kill Gunter in order to keep the $400 marijuana money for themselves. Since Haught retracted his statement, which is the only evidence of record to support the allegation of conspiracy, the conviction of the conspiracy to rob Gunter cannot be sustained. See, MCM, paragraph 74a(2). Accordingly, we grant appellant's eighth assertion of error, and set aside and dismiss the finding of guilty to specification 3 of Charge I.

IX

Appellant asserts that the military judge erred by refusing to instruct the members on the lesser included offense of unpremeditated murder. Appellant argues that if the members were to have

disbelieved Haught's testimony, they could have concluded that a real drug deal was taking place and that it went sour, shooting started, and Gunter was then somehow killed in the process.

There is no question that a military judge must instruct the members on all lesser offenses reasonably raised by the evidence. United States v. Jackson, 6 M.J. 261 (C.M.A. 1979). In the instant case, however, appellant's contentions are not reasonably raised by the evidence. As Government appellate counsel correctly points out, one would have to indulge in a suspension of logic and common sense to reach such a conclusion or inference. In anything, these wild stabs in the dark by appellant would seem to raise a defense akin to alibi, rather than call for an instruction on unpremeditated murder.

Had the members chosen to disbelieve Haught, they would have acquitted appellant. Since the evidence does not even reasonably raise the lesser included offense of unpremeditated murder, we accordingly dismiss this ninth assignment of error.

X

In his tenth assertion of error, appellant contends he was denied his constitutional right to cross-examine four of the government witnesses. Appellant cites Davis v. Alaska, 415 U.S. 308 (1974) and Pointer v. Texas, 380 U.S. 400 (1965). To be sure, the Sixth Amendment to the U.S. Constitution affords an accused the right to full confrontation and cross-examination of witnesses against him as to all relevant subjects of inquiry. In the instant

case, however, the defense counsel's line of questioning was not germane to any issue that had been raised by the evidence.

PFC [M], LCPL [V], and PFC [R] testified for the government on the merits that appellant had approached them individually on 6 February 1981 offering to sell them marijuana at $100 a pound. The defense counsel desired to cross-examine these three witnesses on their previous involvement with drugs. Defense counsel stated it was his purpose to show that the drug transaction allegedly being set up by appellant was legitimate, rather than bogus as alleged by the government. The military judge foreclosed the defense counsel from inquiring into the witnesses' past involvement with marijuana, but ruled

that defense counsel was free to recall the witnesses if he could provide evidence that this drug transaction was indeed legitimate. The defense, however, never did offer any such evidence. As was the military judge, we are at a loss to perceive the relevance of this line of questioning. These three witnesses were under the belief that they would be able to buy marijuana through the appellant at $100 a pound; the fact that these witnesses might have been involved in previous drug transaction is totally irrelevant to the issue of the bogus nature of this drug transaction and these witnesses' belief in its legitimacy.

The fourth witness, LCPL [D], originally gave a statement to NIS that he had merely loaned appellant $100. After talking to the trial counsel, he

then changed his statement to indicate that he gave appellant the $100 on 6 February 1981 for one pound of marijuana. Defense counsel attempted on cross-examination to ask LCPL [D] whether he had been given any promises against prosecution prior to making the second statement. The military judge disallowed this question because no foundation had been laid that prosecution was a possibility; however, the judge did allow the defense counsel to ask the witness whether any threats or promises had been made to him prior to the giving of this second statement. Appellant contends that the military judge erred in not allowing him to ask the question concerning promises against prosecution. The object of such a question, however, is to bring out the witness' bias or

motive to misrepresent; by allowing defense counsel to ask whether any promises or threats had been made before he made the second statement, the impeachment of the witness was accomplished. Mil. R. Evid. 608(c). This assignment of error is, accordingly, rejected.

XI

In this assertion of error, appellant contends that the trial counsel committed prejudicial error in his argument on sentence. Appellant specifically objects to the following two portions of trial counsel's rebuttal argument on sentence:

1) . . . keep in mind that this accused has brought agony to another family as well. The GUNTERS' at Fort Worth, Texas, have lost a son and a brother. And how did they lose him? Did they lose him

> after a four week trial and the pleadings of three lawyers and all the applications of the military justice system? No, they lost him at the barrel of a shotgun. Did they lose him after a long round of tearful farewells? No, they lost him before they ever knew it, at the barrel of a shotgun on Friday in February in the woods of Camp Lejuene. Those who are fathers can sympathize perhaps with that.

R. at 1304 (emphasis supplied).

> 2) . . . that one thing is certain, gentlemen, and that is that this individual is a dangerous man and that danger could be stopped, that danger could be terminated, if the accused is sentenced to death.

Id.

In regard to the first excerpt, appellant relies on United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976), where in a conviction for rape, the court held that a prosecutor's argument suggesting that the court-members put themselves in the place of the victim's

family was inflammatory and constituted prejudicial error. Although we agree with appellant that trial counsel's concluding remark here was improper, we find it to be neither inflammatory nor prejudicial. In Shamberger, the trial counsel told the members to think of their wives: "picture your wife having her clothes ripped off and then being raped, once, twice, three times, four times, five times." In the instant case, however, trial counsel never made any such direct plea to the members that they should imagine one of their own relatives as the victim. As such, trial counsel's remark is bland and pale in comparision to the remarks of counsel in Shamberger. The defense counsel objected to this remark at trial, but in light of the

lengthy sentencing arguments and in light of the serious magnitude of appellant's crime, we doubt that trial counsel's remark could have had more than a minimal impact on the members. It was not so egregious as to have called for a cautionary instruction by the military judge, let alone the setting aside of the sentence by us.

Defense counsel did not object to the second excerpt from trial counsel's argument at trial. Appellant now contends, however, that trial counsel was arguing facts not in evidence. Appellant argues that characterizing him as "a dangerous man" and urging the court-members to impose death to terminate "that danger" implies (1) that

the appellant cannot be rehabilitated and (2) that the appellant, if not sentenced to death, would again commit offenses similar to those of which he was convicted. Appellant asserts the record is devoid of any evidence suggesting the likelihood of either event. It is well established, however, that counsel is permitted to argue any reasonable inferences from the evidence. United States v. Doctor, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956); United States v. Tanksley, 7 M.J. 573 (A.C.M.R 1979) aff'd 10 M.J. 180 (C.M.A 1980); United States v. Campbell, 8 M.J. 848 (C.G.C.M.R. 1980). To characterize one who has been found guilty of premeditated murder, conspiracy to commit premeditated murder, robbery, and conspiracy to commit

robbery as a "dangerous man" would seem to us a reasonable inference to draw. It is a little difficult for us to find misconduct or impropriety which compels reversal when it purportedly arises out of an argument which had so little impact on defense counsel, who had vigorously objected to other portions of trial counsel's arguments, that they sat silently by and failed to mention it to the military judge in a subsequent UCMJ Article 39(a) session.

Accordingly, this assignment of error is rejected.

XII

Appellant asserts that the sentence to death is inappropriately severe. Article 66(c), UCMJ, requires a Court of Military Review to disapprove any

sentence which in view of the entire record is not fair and just. While it is recognized that sentencing is not an exact science and that we should strive for uniformity, the sense of justice of the community where the crime was committed should not be disturbed unless the harshness of the sentence is so disproportionate as to cry out for sentence equalization. United States v. Usry, 9 M.J. 701 (N.C.M.R. 1980) pet. denied 9 M.J. 402 (C.M.A. 1980). Our review of the record, in light of the guidelines established by Usry, convinces us that the sentence of death is most appropriate in the instant case.

Appellant was 21 years old at the time of the offense. He was raised in Georgia, where he had been active in

sports and community activities. He was described by those who had watched him grow up as an honest, caring, and respectful person who was considerate of, and had deep feelings for others. He was popular in high school and was characterized as being one of the best behaved students in school. Appellant had strong patriotic feelings for his country and entered the Marine Corps at age 17. At the conclusion of recruit training, appellant married, his wife later giving birth to a daughter. Appellant was characterized as a devoted family man. Appellant's three and one-half years of military service, however, were not exemplary. He accumulated three non-judicial punishments and one summary court-martial (for minor

unauthorized absences and one specification of making a false official statement). His proficiency and conduct markings averaged 4.1 and 3.9, respectively. Appellant did, however, participate in several deployments, received a letter of commendation for his performance as an assistant navigator aboard the USS HERMITAGE, had high classification and assignment test scores, and successfully had completed a number of service schools and courses.

This background, however, does not demonstrate to us a propensity for rehabilitation in light of appellant's manipulations, scheming and planning over the space of a month to rob and kill his fellow Marines not only for the money, but also, it would seem, for the mere

pleasure of it. Appellant never showed any remorse; in fact, appellant sought assurances from Haught after the killing of Gunter that Haught would not let this killing bother his conscience (R. 947). Appellant's actions can only be described as wanton, vicious, cruel, and depraved. He conspired to kill PFC McCrae in order to obtain McCrae's rifle card. After minimal success in his payday robberies, he managed to lure PVT Gunter into an isolated spot in the woods, where he hid in the bushes with a shotgun, and then shot Gunter with cold and calm premeditation. Although Gunter screamed and pleaded for mercy, appellant shot him again, and then gave the loaded shotgun to Haught so Haught, too, could fire a round into Gunter. To kill a fellow

Marine with whom he had lived and worked for over a year in such a senseless, premeditated, and cold-blooded manner is an abomination of the highest magnitude. Such brutal and reprehensible conduct represents a most dangerous threat to the community. Military society, through the voice of the court-members, has expressed its "moral outrage" at appellant's crimes. The record reveals no reason to dispute that judgement. We reject out of hand the suggestion, made by appellate defense counsel during oral argument, that the murder is somehow mitigated by the fact that the victim did not have to suffer for very long between the first shotgun blast and the time he expired. We think the crime was committed in a manner appropriately characterized as a consummate example of man's inhumanity to man.

We would note that disparity in sentences between co-conspirators is often the subject of consideration by intermediate sentence reviewing authorities. See United States v. Snelling, 14 M.J. 267 (C.M.A. 1982). Appellant's case however, is not susceptible to a favorable application of this doctrine. Appellant's position as motivator, perpetrator, solicitor, and initiator of PVT Gunter's death outweighs LCPL Haught's participation many fold. Further, had LCPL Haught not cooperated with authorities, justice for PVT Gunter's death may never have been achieved. Haught's approved sentence of 50 years confinement at hard labor is not such a disparity that cries out for relief given the appellant's primary

roles in the crimes. See United States v. Snelling, supra at 269; United States v. Olinger, supra at 461 (C.M.A. 1982); United States v. Usry, supra. As we did in our recent decision of United States v. Rojas, supra, we again note the recent execution of a Texas prisoner whose accomplice in murder received a life sentence and will be eligible for parole as prescribed by statute. See Brooks v. Texas, decided as a companion case to Furman v. Georgia, 408 U.S. 238 (1972).

XIII

Appellant asserts that he was charged with seven specifications which arose from basically the same transaction:

1) conspiracy to murder Gunter
2) conspiracy to rob Gunter
3) premeditated murder of Gunter

4) murder while robbing Gunter

5) robbery of Gunter

6) solicitation of Haught to rob Gunter

7) solicitation of Haught to murder Gunter.

Relying on United States v. Sturdivant, 13 M.J. 323 (C.M.A. 1982), appellant argues that since this is substantially one transaction, he has been prejudiced by an unreasonable multiplication of charges, and that the findings and sentence, therefore, should be set aside.

We disagree. It is a well-established principle of law that a solicitation, a conspiracy, and the substantive offense itself are separate and distinct criminal acts, and can, therefore, be separately prosecuted. See e.g. United States v. Dunbar, 12 M.J. 218

(C.M.A. 1982). Although we agree with appellant that the specifications of felony murder and premeditated murder are multiplicious for findings, we specifically find that these two specifications were properly pled for contingencies of proof. See paragraph 26b, MCM.

The military judge found that for sentencing purposes the conspiracies to murder Gunter and to rob Gunter were multiplicious; the premeditated murder of Gunter, the felony murder, and the robbery of Gunter were multiplicious; and the solicitations to rob and murder Gunter were multiplicious. The military judge instructed the members accordingly. Absent any evidence to the contrary, it must be presumed that the members

correctly followed and complied with the instructions of the military judge. United States v. Ricketts, 1 M.J. 78 (C.M.A. 1975). We cannot, therefore, perceive any prejudice to appellant during sentencing.

The thirteenth assignment of error is, accordingly, dismissed.

XIV

Appellant invites our attention to the errors as set forth by trial defense counsel in their response to the staff judge advocate's review. These asserted errors, however, were individually addressed by the staff judge advocate in his first endorsement to defense counsel's response. We concur with the staff judge advocate's treatment of the issues, and, furthermore, we specifically

find upon a careful examination of both the staff judge advocate's initial review and his first endorsement to defense counsel's response that the convening authority was provided with accurate and adequate advice to guide him in his statutory duty of review. Accordingly, this assignment of error is dismissed.

For the reasons stated above, we conclude that the findings, with the exception of Charge I, specification 3,and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of appellant was committed. The finding of guilty to Charge I, specification 3 is

set aside and dismissed; the remaining findings of guilty are affirmed. The sentence, upon reassessment, is likewise affirmed.

/s/ _____
K. L. ABERNATHY

Judge BARR and Judge MALONE concur.

/s/ _____
PHILIP C. BARR

/s/ _____
M. G. MALONE

APPENDIX D

From: Michael J. Saks, Ph.D., Department of Psychology, Boston College, Chestnut Hill, Massachuesetts 02167

To: Captain Joseph M. Poirier, USMC, Appellate Defense Division Navy-Marine Appellate Review Activity, Washington Navy Yard-Bldg. 200, Washington, D.C. 20374

Subj: Size of judicial decision-making body in military trials

Ref: (a) Hare, A.P. Handbook of Small Group Research. New York: Free Press (1976).

(b) Havron, M.D., Et al., The Effectiveness of Small Military Units. Washington, D.C.: The Adjutant General's Office, Personnel Research Section (1952) (PRS Rep. 980)

(c) McGrath, J.E., and Altman, I., Small Group Research. New York: Holt (1966).

(d) Saks, M.J., The Limits of Scientific Jury Selection: Ethical and Empirical, 17 Jurimetrics Journal 3022 (1976).

(e) Saks, M.J., Jury Verdicts. Lexington, MA: D.C. Heath (1977).

(f) Saks, M.J., and Hastie, R., Social Psychology in Court. New York: Van Nostrand Reinhold (1978).

(g) Stouffer et al., The American Soldier. (Part of series, Studies in social psychology in World War II). Princeton, NJ: Princeton University Press (1949).

(h) Zeisel, H., "...And then there were none:" The Diminution of the Federal Jury. 38 U.Ch.L.Rev. 710-724 (1971).

(i) Figure 1 (attached)

1. As I understand the issue, it is that the research findings on group decision-making as a function of group size which were adverted to by the U.S. Supreme Court in Ballew v. Georgia are thought by some not to apply to military populations. To my knowledge, none of the studies that have been conducted on the question have employed military

populations. I think, however, that in the absence of such direct studies, the most defensible conclusion is that the same principles would apply to military as to civilian decision-makers. In the paragraph below I present the general rationale and evidence that lead me to believe this. Let me apologize in advance for any misstatements I might make regarding particulars of procedures in military courts, with which I am unfamiliar. My expertise goes only to the effects of size of group behavior.

a. In the 1940's and 50's a substantial portion of social psychological research on small group behavior was done in, by and for the military. Summaries of much of this work may be found in Hare (1976), McGrath and Altman (1966), and the famous series by

Stouffer et al. (1949) on The American Soldier. Virtually all of the social psychological phenomena observed among military same principles of attitude change, group influence, and decision-making were found to hold. In particular, it has been repeatedly found, contrary to popular belief, that the composition of a group (that is, the age, education, and other demographic characteristics of group members) bear little or, usually, no relation to the performance of the group's task (e.g., McGrath and Altman, 1966, p. 106-107; Havron et al., 1952; Saks, 1976; Saks and Hastie, 1978). (What can make a difference are specific technical skills required by the task; in the jury situation this is rarely a problem).

b. Most of the variables of interest to the Court in Ballew are especially unlikely to behave differently with the use of different populations. Some are strictly statistical phenomena, where it matters not whether the group members are military, civilian, or even whether they are people. That is, the ability of groups of varying sizes to provide cross-sectional representation of the community from which they are drawn depends only upon the distribution of objects (people, marbles, cars, anything) in the population and the size of the sample. Similarly, one of the major virtues of a group over individuals is its ability to bring together diverse intellectual and experiential resources. That ability grows with the group's size (although with each additional member

each incremental improvement is less than the one that preceded it). Further, there is no obvious reason to think that if larger groups lend themselves to greater resistance of group members to conformity pressures by the majority or promote group deliberation, the population from which the group is drawn will alter these general phenomena (see Zeisel, 1971; Saks, 1977).

c. To say simply that one population is different from another and therefore the findings from one do not generalize to the other is a misleading oversimplification. If a functional relationship if found among population A between size and, say rate of conviction, even a finding that population B convicts at a different rate than population A does not negate the functional

relationship. Only an "interaction" of particular sorts could do that. This is illustrated in Figure 1a, where the two different populations show a difference in conviction rates, but their pattern of response to jury size changes in the same. The suggestion that the findings from one population do not apply to another really implies the relationships shown in Figure 1b an 1c. Here, the relation between size and convictions found in population A either does not hold for population B or is reversed. Without evidence we cannot be certain, but that such a "statistical interaction" obtains in the switch from civilian to military populations seems highly unlikely.

d. In trying to think of some differences that my (sic) exist among

military populations that could produce such differences, two possibilities occur to me. One is the hierarchical relatioship that exists among military personnel. The second is the existence of a likelihood of future interaction among "jury" members. It may be, for example, that due to the influence of higher ranking members, other members of the decision-making body play no independent role, and in essence rubber stamp the preference of the highest authority. I have no way of knowing if this is the case, but it would make the size of the body far less important. This difference is not one of demographics of the military population, but the social structure within which they operate. The suggestion in this paragraph is highly speculative. The

point of making it is chiefly to indicate that those who think the difference in populations makes a difference ought to specify just what they believe to be the critical element(s), and offer evidence that takes us beyond speculation.

2. In summary, while I am aware of no direct tests of the question at hand that have been conducted on military populations, it is highly unlikely that that would be a difference that makes any difference. The steps of inference in reaching this conclusion are small ones. In other areas of research, only negligible or no differences have been found between civilian and military populations. There is no apparent reason why the same should not be true in regard to the variable of group size. Moreover,

some of the phenomena adverted to in Ballew are statistical and have nothing to do with the social characteristics of the population from which a jury is drawn.

Sincerely yours,

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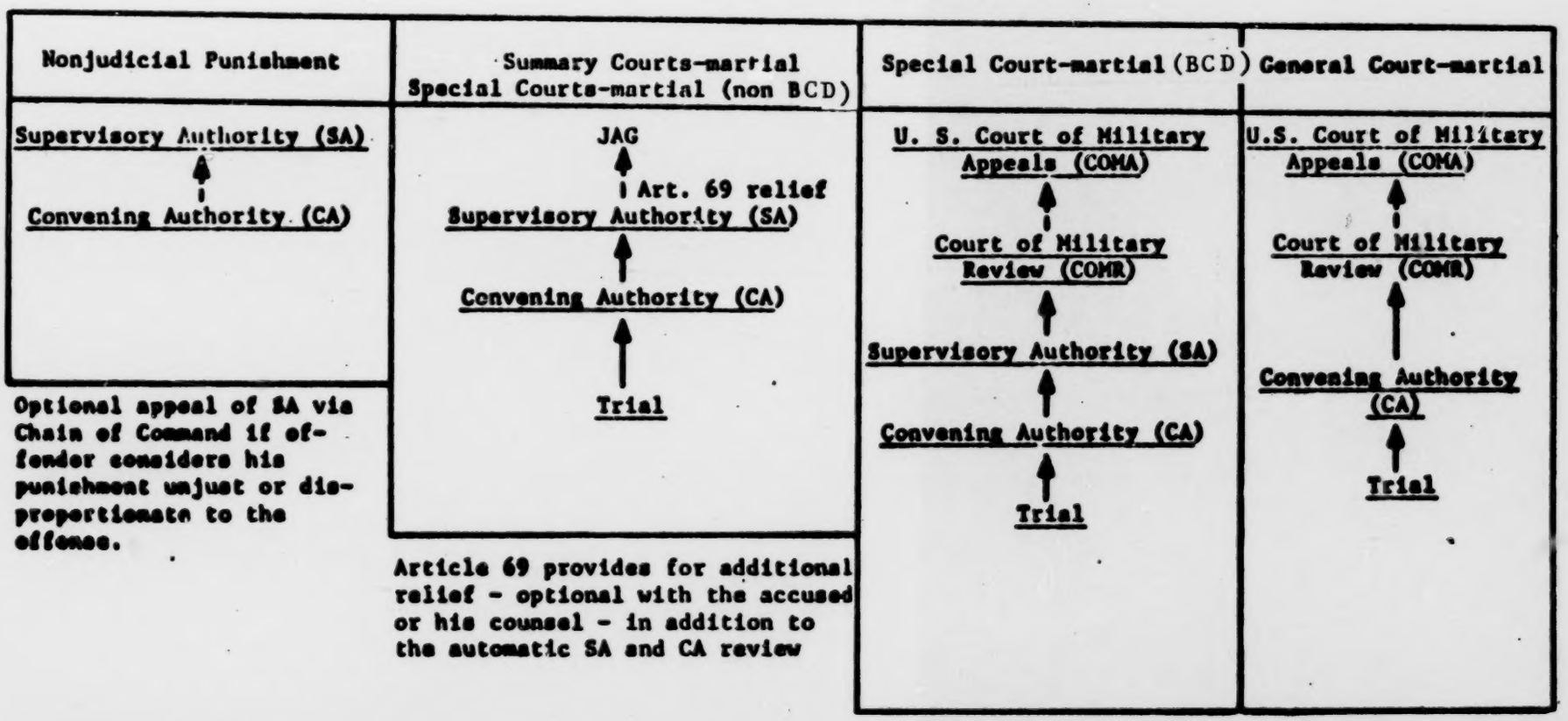
MASTER VU-GRAPH MOUNT FOR

OVERVIEW-APPEALS WITHIN THE MILITARY JUSTICE SYSTEM



COMR reviews the record of trial in any case in which the sentence: 1) affects a general or flag officer, 2) extends to death, 3) dismissal of a commissioned officer, cadet, or midshipman, 4) dishonorable or bad conduct discharge, or 5) confinement in excess of one year.
COMA reviews the record of trial in any case: 1) that affects a flag officer, 2) extends to death, 3) all cases reviewed by COMR which JAG orders sent to COMA for review, 4) all cases reviewed by COMR in which the accused requests review and COMA grants it.
(In a general court-martial, if the case does not involve a flag officer, death or dismissal, BCD, DD, or confinement of 1 year; the case is first reviewed by the CA then JAG. COMR does not review it.)